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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 36

DUKE LEE LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 41–42) is reported at 352 F. 2d 799.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1965 (R. 42). The petition for a writ of certiorari was filed on December 9, 1965, and granted on January 31, 1966 (R. 43; 382 U.S. 1024). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it was a violation of the Fourth Amendment for an undercover agent to complete a purchase

of marihuana at petitioner's home without a search warrant after going to the home at petitioner's invitation.

STATEMENT

Petitioner, who waived a jury trial, was convicted in the United States District Court for the District of Massachusetts of transferring marihuana without an order form on December 3, 1964 and December 17, 1964 (R. 3–4, 40). He was given concurrent sentences of imprisonment for five years (R. 16–17).

The only issue concerns the admissibility of the evidence pertaining to the transfer of marihuana in petitioner's home to an undercover agent. Petitioner moved to suppress as evidence the marihuana obtained in his home on the ground that it was illegally seized without a search warrant by an agent who deceived him by posing as an ordinary citizen (R. 4–5). After a hearing (R. 6–15), and at the conclusion of the trial (R. 39–40), the trial court held that the marihuana was transferred voluntarily by a manual transfer and that nothing was taken or seized by the government. The court of appeals affirmed (R. 41–42; 352 F. 2d 799). Finding that the agent was invited to petitioner's home for the purpose of the sale, it rejected petitioner's argument that the misrepresentation of the agent's identity made the transfer an unlawful search and seizure. The pertinent evidence may be summarized as follows:

On December 3, 1964, at about 11 p.m., Edward Cass, a narcotic agent, telephoned petitioner at his home and said "This is Jimmy the Pollack [*sic*]. A friend of ours told me you got some pretty good

grass".[1] Petitioner replied, "Yes, he told me about you, Pollack," and then said, "I believe, Jimmy, I can take care of you." The agent said, "Fine. I want about five bags." Petitioner answered: "Do you know where I live?" When the agent said he did not, petitioner gave his address and directions to his home. Petitioner then said: "Okay, come on right over, it should take you about 15 minutes." The agent knew that grass was a slang term for marihuana (R. 11, 20, 24, 30).

When Cass reached petitioner's home, he knocked on the door. Petitioner opened the door, and the agent said "Duke?" Petitioner said, "Come on in." The agent went into the hallway in the apartment and petitioner closed the door behind him. The agent said, "I'm Jimmy." Petitioner said, "What is that nickname they call you?" The agent answered, "Pollack". They then went into the living room and sat down. Petitioner asked the agent where he came from and what he did. The agent replied that he came from Rhode Island and had a saloon there, and petitioner replied that he, too, owned a saloon. Petitioner then said, "Your stuff is out on the porch, Pollack." During the conversation petitioner agreed to give the agent six instead of five bags for $50 if the agent became a regular customer. The agent paid petitioner $50 and was directed out the front door to

[1] Cass had obtained petitioner's name when he had asked one Richard Gold to put him in touch with somebody from whom he could procure marihuana (R. 31). The government was not permitted to show that prior to December 3, 1964, it had information from other sources about petitioner (R. 36).

a package wrapped in newspaper on the front porch. The agent picked up the package, which contained five bags of marihuana. As he left, he told petitioner that he would see him in about a week (R. 12–13, 22–23).

On December 17, 1964, at about 12:15 a.m., Cass again telephoned petitioner. He said "This is Pollack. I want to pick up six of those bags for $50." Petitioner replied, "Okay, I can take care of you. Come on right over" (R. 11, 26–27). Cass then drove to the house with another agent. Cass knocked on the door and was let in by petitioner. At the front door Cass gave petitioner $50 for a package which contained six envelopes of marihuana. When petitioner reopened the door, he said, "You left your motor running." Cass replied that a friend of his was waiting in the car. Petitioner said he would see Cass later and the agent departed (R. 13, 27). On April 27, 1965, petitioner was arrested (R. 10).

SUMMARY OF ARGUMENT

1. Petitioner's constitutional rights were not violated by the government's use of an undercover agent to discover petitioner's criminal activities. This Court has consistently recognized that it is sometimes necessary for the government to use artifice and stratagem in the detection of crime. The very same Congress which proposed the Bill of Rights enacted laws rewarding informers, and similar statutes have been on the books since that time. The Fourth Amendment is not violated when statements are made by a suspect to a supposed friend who is really a gov-

ernment informant; conversation involves no physical intrusion into the human body and seldom—assuredly not on the facts of this case which raise no suggestion of coercion or pressure—does it concern thoughts which the suspect would like to keep to himself. Nor is the Fifth Amendment violated when there is no element of compulsion. With respect to certain kinds of crimes, the use of informants is the only practical means of apprehending the guilty, and so long as there is no entrapment the government's conduct is permissible.

2. The fact that the transaction in this case was consummated in petitioner's home does not convert the otherwise lawful conduct into a violation of the Fourth Amendment. Petitioner chose to make his home a place of business and he invited the agent to enter it for the purpose of purchasing marihuana. That is all the agent did. The face-to-face conversations between them were not privileged, and they did not become so by reason of the participants' presence in petitioner's home. For petitioner was not relying on the privacy of his home to keep secret what he said to the agent or what he voluntarily transferred to him. The disclosure by the agent was, in short, a breach of petitioner's expectations and not a breach of privacy. This is "the kind of risk we necessarily assume whenever we speak." *Lopez* v. *United States,* 373 U.S. 427, 465 (dissenting opinion of Justice Brennan). The flaw in petitioner's argument becomes the more obvious if one considers its practical consequences. It would result in a rule of privilege that

would immunize criminal activity conducted in the home or office, and would prevent the testimony of informants even though they violated no privacy and did no more than participate in the very activity in which they were invited to engage.

ARGUMENT

THE GOVERNMENT'S UNDERCOVER AGENT DID NOT VIOLATE THE FOURTH AMENDMENT BY CONSUMMATING PURCHASES OF NARCOTICS IN PETITIONER'S HOME AT PETITIONER'S INVITATION

In response to a government agent's telephonic representation that he was "Jimmy the Pollack" who had heard that petitioner had good marihuana for sale, petitioner invited "Jimmy" to his home, told him how to get there, sold him marihuana on the premises, and arranged a discount price for future purchases. The only issue presented to this Court is whether, in these circumstances, the agent obtained the marihuana and petitioner's oral admissions in violation of the Fourth Amendment's guarantee of "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures * * *." We submit that no prohibited invasion of "personal privacy and dignity" (*Schmerber* v. *California,* 384 U.S. 757, 767) is shown by the facts of this case and that there is no basis in the policy of the Fourth Amendment or in the history of its adoption and application for prohibiting conduct of the sort involved here.

Petitioner's claim has two facets, and, to facilitate analysis of the relevant legal issues, we discuss each

of them separately. First is the underlying question whether the government's use of undercover informants—*i.e.*, individuals who engage in deception and stratagem in order to discover evidence (including oral admissions) of crime—is permissible. Second is the issue more squarely argued by the petitioner—whether the Fourth Amendment is violated if an undercover informant speaks to, or has other dealings with, a suspect in a place which is subject to the protections of the Fourth Amendment.

A. THE GOVERNMENT MAY CONSTITUTIONALLY EMPLOY INFORMANTS WHO DISGUISE THEIR IDENTITY OR INTENTIONS IN ORDER TO OBTAIN EVIDENCE OF CRIME

It has long been settled by the decisions of this Court that, subject to appropriate safeguards, the government's use of informants, decoys, and other forms of deception and stratagem in the detection of those engaged in criminal enterprises is a legitimate investigative technique. See, *e.g.*, *Grimm* v. *United States*, 156 U.S. 604, 610–611; *Goode* v. *United States*, 159 U.S. 663, 669; *Rosen* v. *United States*, 161 U.S. 29, 42; *Andrews* v. *United States*, 162 U.S. 420, 423; *Price* v. *United States*, 165 U.S. 311, 315; *Olmstead* v. *United States*, 277 U.S. 438, 468; *Sorrells* v. *United States*, 287 U.S. 435, 441; *Sherman* v. *United States*, 356 U.S. 369, 372; *Masciale* v. *United States*, 356 U.S. 386. As observed in *Sorrells* v. *United States*, *supra*, 287 U.S. at 441: "Artifice and stratagem may be employed to catch those engaged in criminal enterprises." See, also, the concurring opinion of Justice Roberts, *id.* at 453–454. As the present Chief Justice

stated in *Sherman* v. *United States, supra,* 356 U.S. at 372: "Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer."

Referring specifically to informers, the Second Circuit, in *United States* v. *Dennis,* 183 F. 2d 201, 224, affirmed on a different issue, 341 U.S. 494, summarized the relevant law and its underlying rationale in the following pertinent language (per Learned Hand, J.):

> Courts have countenanced the use of informers from time immemorial; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely upon them or upon accomplices because the criminals will almost certainly proceed covertly. Entrapment excluded, of which there was none here, decoys and other deception are always permissible.

Earlier, in *Olmstead* v. *United States, supra,* 277 U.S. at 468, this Court had similarly pointed out that testimony by persons who have pretended to become parties to criminal enterprises, and given themselves every appearance of actively collaborating in the unlawful activities, *"for the purpose of securing evidence,"* "has always been received" (emphasis added). See, also, *Wellman* v. *United States,* 227 F. 2d 757, 770 (C.A. 6), vacated on other grounds, 354 U.S. 931; *Blanchard* v. *United States,* 40 F. 2d 904 (C.A. 5), certiorari denied, 282 U.S. 865.

The admissibility of such testimony has never been discussed in constitutional terms, but we think it plain

that the use of undercover informants to obtain evidence, including oral admissions, offends neither the Fourth nor the Fifth Amendment. As a historical matter, it is clear that the use of government informants is as old as the Bill of Rights. The First Congress enacted a statute making misprision of treason and felony a crime. Sections 2 and 6 of the Crimes Act, 1 Stat. 112, 113. The legal duty to report the commission of known felonies was thereby imposed on any person who had learned that such crimes had been committed. Indeed, the First Congress—which also proposed the Bill of Rights—enacted a statute encouraging certain kinds of informants by awarding to them the penalties assessed upon those found guilty of the crimes about which information was given. Act of July 31, 1789, Sec. 38, 1 Stat. 29, 48. And various statutes since that time have provided for similar rewards to informants. See, *e.g.*, Act of March 3, 1797, 1 Stat. 506; 21 U.S.C. 183; 25 U.S.C. 201; 31 U.S.C. 232(E)(1). See also *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537; *Marvin* v. *Trout*, 199 U.S. 212, 225; *United States* v. *Murphy*, 16 Pet. 203. There is no meaningful difference, from the standpoint of governmental participation, between the case of the individual who is requested by government agents to report what a suspect says to him and the case of an individual who engages in the same conduct in response to a general statutory offer of a reward.

The Fourth Amendment has no application to the use of informants, as such, because when an informant hears what is said to him and reports it to the

government, he is not seizing what he has heard in violation of a right to be secure in "persons, houses, papers, and effects." The person who has disclosed information to him has not had his privacy invaded; he has voluntarily chosen to communicate with another. An *amicus curiae* brief filed in *Osborn* v. *United States,* No. 29, this Term, asserts that privacy is invaded when the services of an informant are used by the government because a suspect's inner thoughts are thereby deceptively elicited (ACLU *Amicus* Br. No. 29, p. 6). What this assertion overlooks, however, is that, more often than not, a statement made to a pretended confederate or friend is not really the expression of an "inner thought" which the speaker wishes to keep to himself and only reluctantly discloses; it is usually a voluntary communication which the speaker affirmatively wants the auditor to hear. This case presents a most striking illustration, for it is entirely clear that it required no persuasion whatever for petitioner to utter his incriminating statements. Petitioner said what he did not as a result of any efforts to "ferret out * * * inner thoughts" (ACLU *Amicus* Br. No. 29, p. 6) but because his statements were the means of furthering the offense which he wished to commit. In short, petitioner was not interested in keeping secret the words he uttered; his desire was to communicate them to anyone who was a cash buyer of marihuana.

Physical instrusions into the human body are, to be sure, subject to the limitations of the Fourth Amendment. *Schmerber* v. *California,* 384 U.S. 757, 767–

770. But ordinary face-to-face conversation involves no physical intrusion, cannot be considered a "search" in the ordinary meaning of the term, and surely does not "depend antecedently upon seizures of 'persons' * * *." *Schmerber* v. *California, supra,* 384 U.S. at 767. If learning "inner thoughts" constitutes an unlawful search of a person within the meaning of the Fourth Amendment, the same should be true of the coerced extraction of a confession—obviously an expression of "inner thoughts." Yet it has never been suggested that a coerced confession amounts to a violation of the Fourth, as contrasted with the Fifth, Amendment. But even were it otherwise a conversation could hardly be considered an *unreasonable* search when unaccompanied by any suggestion of coercion or pressure.

Turning to the Fifth Amendment, it has never been suggested that obtaining information through a ruse from one who is not in custody or subjected to any form of coercion constitutes compulsion within the meaning of the Fifth Amendment's self-incrimination clause. This Court was careful, for example, to restrict its holding in *Miranda* v. *Arizona,* 384, U.S. 436, to "custodial interrogation" (384 U.S. at 444) because "the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present" (384 U.S. at 478) when the individual being interrogated retains his freedom of action. Suspects who have not been arrested may, of course, be as ignorant of their rights as those who have, but their statements have not then been "compelled" within the

meaning of the Fifth Amendment. Similarly, persons not in custody may be beguiled or betrayed by those to whom they reveal confidences, but such deception does not mean that their statements have been obtained in violation of constitutional right. As Justice Brennan stated in *Lopez* v. *United States,* 373 U.S. 427, 465 (dissenting opinion), the risk of being "betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society."

This is particulary true when, as in this case, in *Osborn,* No. 29, this Term, and in *Hoffa,* Nos. 32–35, this Term, the statements so obtained are not mere admissions of past crimes but declarations in furtherance of a criminal scheme or a disclosure of a criminal conspiracy which is then and there pursuing its unlawful objective. For the self-incrimination provision of the Fifth Amendment does not bar the use of declarations which were part of the criminal scheme being prosecuted. Such statements are not "testimonial" any more than silent acts by which the offense is committed. Cf. *Schmerber* v. *California,* 384 U.S. 757, 763–765.

There is similarly no substance to the claim epitomized by the assertion of the American Civil Liberties Union as *amicus curiae* in *Hoffa et al.* v. *United States,* Nos. 32–35, this Term, that the use of government informants is "the hallmark of a police state" (ACLU *Amicus* Br., No. 32, p. 14). Whether government activity smacks of a "police state" turns on the nature of the information which the government

seeks to obtain. If informants are asked to report to government officials matters which are within the legitimate sphere of speech and association, as was true in the regimes of Nazi Germany or Stalinist Russia, the dangers of a "police state" are real indeed. The framers of our Constitution, who were not unaware of that evil in light of the then recent experiences of John Wilkes in England,[2] secured the inhabitants of this nation against such practices by guaranteeing freedom of speech and association in the First Amendment. See, *e.g., National Association for the Advancement of Colored People* v. *Alabama,* 357 U.S. 449; *Bates* v. *Little Rock,* 361 U.S. 516; *Gibson* v. *Florida Legislative Comm.,* 372 U.S. 539. The right thus secured does not, however, extend to information concerning illegal activity. Whatever may be the code of the underworld, there is nothing reprehensible in informing law-enforcement authorities about plans to commit murder, treason, kidnapping, or even of schemes to transfer narcotics or corruptly to influence jurors. Nor is there anything ignoble in the government's encouragement of informants of this kind, particularly in cases where the offense has not yet been committed. Government surely has an obligation to protect the law-abiding—the obligation to apprehend and convict offenders and to prevent the commission of crimes whenever possible. And "[i]t is an act of responsible citizenship for individuals to give whatever information they may have to aid in

[2] See 2 May, *Constitutional History of England* (1891 ed.) pp. 247–248, 275–276.

law enforcement." *Miranda* v. *Arizona*, 384 U.S. 436, 477–478. See also *In re Quarles and Butler*, 158 U.S. 532, 535–536.[3]

The importance of informants in law enforcement has been emphasized not merely by police officers and those engaged in the prosecution of crime [4] but also by the leading advocates of reform of the criminal law. The Reporters of the Model Penal Code commented upon their proposed entrapment provisions (ALI, Model Penal Code, Tentative Draft No. 9, p. 16):

> 2. *The Definition of Entrapment in the Present Law.* The principal difficulty in defining the police conduct which gives rise to the defense has lain in the fact that some tactics employing misrepresentation and persuasion are necessary to successful police work and ought not to be forbidden. In many cases the need for techniques of this sort clearly overbalances the risk of inducing offending by the innocent. Particularly, in the enforcement of vice, liquor or narcotics laws, it is all but impossible to obtain evidence for prosecution save by the use of decoys. There are rarely complaining witnesses.

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[3] "It is the right, as well as the duty, of every citizen, when called upon by the proper officer, to act as part of the *posse comitatus* in upholding the laws of his country. It is likewise his right and his duty to communicate to the executive officers any information which he has of the commission of an offence against those laws; and such information, given by a private citizen, is a privileged and confidential communication, for which no action of libel or slander will lie, and the disclosure of which cannot be compelled without the assent of the government."

[4] See, *e.g.*, Harney & Cross, *The Informer in Law Enforcement* (1960), pp. 6–12.

> The participants in the crime enjoy themselves. Misrepresentation by a police officer or agent concerning the identity of the purchaser of illegal narcotics is a practical necessity. Cooperation with the criminal and something less than absolute truth is required in many other kinds of cases where the police have an "inside man" in a group of would-be lawbreakers. Therefore, the law must attempt to distinguish between those deceits and persuasions which are permissible and those which are not.

Since, for the reasons we have stated, the use of informants, as such, raises no questions under the Fourth Amendment, there is no basis for the suggestion made by the *amicus* in *Osborn* v. *United States,* No. 29, this Term, that "probable cause" or some other objectively demonstrable quantum of proof be required before the government may use the services of an informant. In practice, such a requirement would seriously hamper legitimate investigation of the most serious offenses. Obviously the opportunities for establishing probable cause are much slimmer before an offense is committed than after. Yet if law enforcement officials are trying, as they were in *Osborn* and *Hoffa,* to anticipate criminal attempts and to prevent their success, they would, under such a rule, be almost helpless to do so by means of the most effective preventive method—*i.e.,* receiving reports from a pretended confederate. Compare *Trupiano* v. *United States,* 334 U.S. 699. And even where the purpose of the officials is not to prevent the success of a criminal endeavor but to provide an opportunity,

for one who is so disposed, to commit an offense under circumstances which will result in the offender's conviction, there is often no time for presentation of evidence to a magistrate. Must an undercover narcotics agent who picks up information bit by bit and makes purchases on a street where the narcotics trade is prevalent retire to a judge's chambers before each street corner transaction? Such a proposal, we submit, violates common sense and is not in keeping with the realistic demands of the Fourth Amendment.

There are, of course, important limits to the deception in which government informants may engage. With these limitations, which are found primarily in the body of law relating to entrapment, we have no quarrel whatever. We agree that it is the function of the law enforcement officer to detect crime and not to create it. The courts should indeed examine the conduct of the informer to satisfy themselves that he did not induce the offense; and that of the defendant to be assured that he was in fact disposed to its commission. *Sorrells* v. *United States,* 287 U.S. 435; *Sherman* v. *United States,* 356 U.S. 369. "[A] line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal," *Sherman* v. *United States, supra,* 356 U.S. at 372.

"However, the fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment." *Ibid.,* quoting from *Sorrells* v. *United States,* 287 U.S. 435. Moreover, the range of conduct in which the informant may engage must vary with the circum-

stances. An agent who has infiltrated a conspiratorial organization which is dedicated to violent retaliation upon members of a particular race, for example, may be forced to pretend that he will take an active part in a particular unlawful venture simply to learn the full nature of the plot. And in uncovering violations of the narcotics, liquor or gambling laws, government agents must take on the guise of prospective customers if they are to discover who is guilty. The degree of participation by an undercover agent must necessarily be a matter of judgment, based on the particular situation as it develops. The on-the-spot decisions which must commonly be made do not lend themselves to the delays involved in obtaining the antecedent judgment of a magistrate on how far to go.

On the facts of this case, it is quite clear not only that entrapment was not an issue (no claim of entrapment was made in the district court), but that the deception was minimal and that there was no effort to induce conduct in which petitioner would not ordinarily engage. Plainly, the agent did not importune the petitioner or resort to psychological or other pressures. He represented that he was a customer who wished to buy and petitioner promptly responded by indicating his immediate readiness to deal. That the petitioner was already involved in a criminal course of conduct is evident not only from his response but from the fact that he had his stock-in-trade on hand. Certainly, the mere fact that the agent made the overture—an essential step if agents

are to ferret out secret traffic in narcotics and other forms of contraband—does not constitute entrapment or any other violation of protected rights. *Masciale* v. *United States,* 356 U.S. 386.

B. A GOVERNMENT INFORMANT DOES NOT VIOLATE THE FOURTH AMENDMENT MERELY BECAUSE HIS DEALINGS WITH THE SUSPECT TAKE PLACE IN THE LATTER'S HOME

We turn now to the question whether decisive constitutional significance attaches to the circumstance that dealings between a government informant and a suspect take place in the suspect's home. Petitioner in this case, like the petitioners in *Hoffa et al.* v. *United States,* Nos. 32–35, this Term, contends that his privacy was invaded by the agent's deceptive entry into his home. The short answer, on the facts of this case, is that petitioner chose to open his home, as a place of business, to any purchaser of marihuana. He is not in a position to invoke the sanctity of his home when the person to whose presence he objects entered at his invitation for precisely the purpose for which petitioner had invited him—*i.e.,* to purchase narcotics—and did no more while he was there than carry out that common objective. Petitioner's real objection is not that the agent was present in his home and purchased marihuana there, but that he dealt with the intention of reporting what had occurred to law-enforcement authorities.

Petitioner's contention rests on a fundamental misapprehension concerning the guarantees of the Fourth Amendment. That constitutional provision does not protect individuals from breaches of trust; it does not cloak with a privilege against disclosure anything said

or done in a home. The shield which the Fourth Amendment erects around a home is designed to keep out unwanted intruders, not to silence those who have been invited to enter.

The circumstances which prompted the proposal and passage of the Fourth Amendment—the use of the general warrant in England and writs of assistance in the Colonies, the decision in *Entick* v. *Carrington,* 19 How. St. Tr. 1029, and the attack on writs of assistance by James Otis—have been too frequently discussed in opinions of this Court to justify their repetition here. See *Boyd* v. *United States,* 116 U.S. 616, 624–629; *Harris* v. *United States,* 331 U.S. 145, 157–161 (dissent); *Frank* v. *Maryland,* 359 U.S. 360; *Marcus* v. *Search Warrant,* 367 U.S. 717, 724–729. See also Lasson, *The History and Development of the Fourth Amendment.* What history demonstrates, however, is that the principal concern of the framers of the Fourth Amendment was to protect the individual against excessive and unreasonable use of governmental power; to insure that government agents would not be able to use their official authority to gain unjustified entry to a home or to engage in a sweeping and indefinite search. This paramount purpose is demonstrated by the fact that the Amendment, as originally drafted, was no more than a prohibition against general warrants. It did not, at first, contain any prohibition upon unreasonable searches and seizures. See Lasson, *op. cit. supra,* at 100–102.

In the form it was ultimately adopted, however, the Amendment protects "persons, houses, papers, and effects" against more than forcible intrusions.

This Court held in *Gouled* v. *United States*, 255 U.S. 298, that what the government could not do, consistently with the Fourth Amendment, by force could not be done by stealth or deception. The agent in this case could not, in other words, disguise himself as a "postman, milkman, priest, rabbi or repairman" (Pet. Br. 9) and then ransack petitioner's home in order to find where the marihuana was hidden. The vice in such conduct is that it invades the privacy of the home; it discloses matter which the occupant of the home intended to keep secret and which he entrusted to the privacy of his dwelling.

Petitioner, on the other hand, was not relying on the privacy of his home to keep secret what he said to the agent and what he did in the agent's presence (except to the extent that he did not want *third parties* to overhear or observe). His statements were intended for the agent's ears and he placed his faith entirely in the agent's trustworthiness. The agent's disclosure of indiscreet revelations which petitioner made to him and acts committed by petitioner in his presence bears no relationship, legal or logical, to the place where the statements were made or the acts were committed. The effect of disclosure would be precisely the same if the transaction had occurred in the street, in a restaurant, or, indeed, if petitioner had visited the agent at the latter's home. If the transaction had occurred in the agent's home, the same statements would have been made and the same quantity of marihuana would have been transferred. But petitioner would not have had even an ostensible basis for claiming that the privacy of his home had been invaded.

The flaw in petitioner's argument is his failure to recognize that the alleged deceptive invasion of his home was unrelated to the harm he suffered, and that it, in fact, resulted in no violation of privacy whatever. It is on that ground that this Court, apparently unanimously, rejected a similar contention in *Lopez* v. *United States,* 373 U.S. 427. The Court held in *Lopez* that Davis, the internal revenue agent who pretended to collaborate in the defendant's effort to bride him (373 U.S. at 438),

> was not guilty of an unlawful invasion of petitioner's office simply because his apparent willingness to accept a bribe was not real. * * * He was in the office with petitioner's consent, and while there he did not violate the privacy of the office by seizing something surreptitiously without petitioner's knowledge. * * * The only evidence obtained consisted of statements made by Lopez to Davis, statements which Lopez knew full well could be used against him by Davis if he wished. * * *

It is important to note that what divided the Court in the *Lopez* case was not the claim that Davis personally had violated the Fourth Amendment by entering Lopez' office without disclosing his real intentions. Indeed, Mr. Justice Brennan's dissent in *Lopez* (joined in by Justices Douglas and Goldberg) fully supports our position in the present case that the agent's personal testimony concerning petitioner's statements to him was admissible notwithstanding the fact that the statements were made in a home to which the agent was admitted only because he misstated his

identity and it was not known that he would report to the government. The dissent states (373 U.S. at 450):

> On Lee assumed the risk that his acquaintance would divulge their conversation; Lopez assumed the same risk *vis-à-vis* Davis. The risk inheres in all communications which are not in the sight of the law privileged. It is not an undue risk to ask persons to assume, for it does no more than compel them to use discretion in choosing their auditors, to make damaging disclosures only to persons whose character and motives may be trusted. * * *

Referring to the government's argument in *Lopez* that if the agent's relatively innocuous conduct in that case were found offensive "the whole gamut of investigatorial techniques involving more serious deception" would also have to be condemned, with the consequence that police officers could "no longer employ confidential informants, act as undercover agents, or even wear 'plain clothes'," Justice Brennan stated (373 U.S. at 465; emphasis added):

> [T]his argument misses the point. *It is not Agent Davis' deception that offends constitutional principles,* but his use of an electronic device to probe and record words spoken in the privacy of a man's office. For there is a qualitative difference between electronic surveillance, whether the agents conceal the devices on their persons or in walls or under beds, and conventional police stratagems such as eavesdropping and disguise. The latter do not so seriously intrude upon the right of privacy. *The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the*

> *identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak.* * * *[5]

In short, there has been no dissent in this Court from the view that statements made to a government informant in the quarters of the declarant, to which the declarant has invited the informant, may be received in evidence (without impinging on any right of the declarant grounded in the Fourth Amendment) through the testimony of the informant himself. See, also, *Blanchard* v. *United States*, 40 F. 2d 904 (C.A. 5), certiorari denied, 282 U.S. 865; *Bush* v. *United States*, 283 F. 2d 51 (C.A. 6), certiorari denied, 364 U.S. 942. *Silverman* v. *United States*, 365 U.S. 505, on which

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[5] Similarly, what divided the Court in *On Lee* v. *United States*, 343 U.S. 747, was not whether Chin Poy, the old-acquaintance-turned-informer, could properly testify to statements which *he* heard On Lee make in On's laundry (the government did not offer Chin Poy as a witness), but whether the narcotics agent, stationed outside with the receiving set, could testify to the statements, as broadcast by the transmitter concealed on Chin Poy. Mr. Justice Burton's dissent, in which Justice Frankfurter joined, made specifically clear the view of those Justices that "Chin Poy, who was lawfully in petitioner's room could have testified as to what he, himself, saw or heard there." 343 U.S. at 766. Similarly, Judge Frank's dissent in the Second Circuit (*On Lee* v. *United States*, 193 F. 2d 306, 316) recognized that the Fourth Amendment "does not safeguard a man from such errors in judging the character of those whom he lets into his house." See also *Trupiano* v. *United States*, 334 U.S. 699, 701–702, 706, where this Court assumed that an agent who had accepted employment at an illicit still in the guise of a "dumb farm hand" could properly supply information forming the basis of a "detailed and effective search warrant."

petitioner relies (Pet. Br. 8–9), is plainly distinguishable because the intrusion there was by an eavesdropper, an outsider to the conversations—precisely the kind of person whom the occupants of the dwelling were seeking to exclude by conversing privately in their home. *Gouled* v. *United States,* 255 U.S. 298 (Pet. Br. 6), is also distinguishable because the government agent who furtively stole documents which the owner did not intend him to see (much less to take) was disclosing by stealth something which the occupant of the office had intended to keep to himself and had secreted in a private office. *Gouled* would be comparable to this case if the occupant of the office had invited the caller-informer to visit him and then, believing that the caller was a friend of his, had *given* him the documents to keep. See also our brief in *Hoffa et al.* v. *United States,* Nos. 32–35, this Term, pp. 131–132.

The explicit invitation made by petitioner in this case plainly distinguishes the facts here from those of the other cases cited in petitioner's brief (Pet. Br. 6). Moreover, in all of the cases cited, government agents entered premises under affirmatively false representations in order to observe what was being done in the privacy of those protected enclosures. The agent in the present case entered petitioner's home because that, fortuitously, is where petitioner wanted to consummate the sale of narcotics. The agent was not, in other words, interested in intruding into a home to hear or observe private conversations or private acts; he was interested only in face-to-face dealings

with petitioner at any location petitioner would choose.[6]

In short, this case involves the exercise of no governmental power to intrude upon protected premises; the visitor was invited and willingly admitted by the suspect. It concerns no design on the part of a government agent to observe or hear what was happening in the privacy of a home; the suspect chose the location where the transaction took place. It presents no question of the invasion of the privacy of a dwelling; the only statements repeated were those that were willingly made to the agent and the only things taken were the packets of marihuana voluntarily transferred to him. The pretense resulted in no breach of privacy; it merely encouraged the suspect to say things which he was willing and anxious to say to anyone who would be interested in purchasing marihuana.

We turn finally to the practical consequences of the rule urged by petitioner. We submit that if facts such as these were held to constitute a violation of

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[6] It is true that in this case there was an element of deception which was not present in *Osborn* and in *Hoffa*—the agent concealed his true name and represented himself as "Jimmy the Pollack." But petitioner did not admit him to his home because he believed his name was "Jimmy" rather than Edward. The misrepresentation as to identity did not, in other words, assist the agent in entering the protected premises. The only relevant representation was that he was a *bona fide* purchaser of marihuana, and it was on the basis of this assertion that petitioner dealt with the agent. The added strategem of calling himself "Jimmy the Pollack" was used only to buttress the credibility of the representation that the agent was truly interested in purchasing marihuana.

the Fourth Amendment, the consequences for law enforcement would be severe. In the narcotics business, for example, where large quantities of contraband require little space, it would encourage peddlers to convert their homes into places of business, and sell all their goods indoors. They would then be secure in the knowledge that no government agent could permissibly negotiate a purchase. And since undercover purchases are the principal means by which narcotics dealers are apprehended, traffickers would inevitably be aided in their illicit operations. The consequences would be hardly less serious if the government were permitted to use passive deception (*i.e.*, failure to disclose an intention to inform), but not active deception (*i.e.*, disguised identities). For then it could rely only upon informants whom a suspect actually knew—not a wholly trustworthy group—but could not corroborate the informant's information by using its own agents, in whose reliability it is justly entitled to place more credence.

Nor would the effects of any such rule be confined to narcotics cases. Numbers operators can conduct their businesses in home or office. Moonshiners can negotiate with customers and employees indoors. Counterfeiters not infrequently set up their presses in the basements of dwellings. Bribers are able to discuss illicit ventures exclusively in offices, homes, and cars. Unlawful conspirators can plot their crimes in the houses of their most firmly committed members.

We submit that nothing in the history or philosophy of the Fourth Amendment justifies the conclusion that

it was intended to make the home a sanctuary for crime, impenetrable to a government agent who does not use his governmental authority to gain entry, violates no privacy, and does no more than what the occupant has invited him to do. The rule advocated by petitioner would give the Fourth Amendment the effect which this Court, speaking through Mr. Justice Douglas, squarely repudiated in *McDonald* v. *United States,* 335 U.S. 451, 455–456—it would "make the home a safe haven for illegal activities."

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be affirmed.

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